No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* ENVIRONMENTAL LAW PROFESSORS IN SUPPORT OF FEDERAL RESPONDENTS AND INTERVENOR-RESPONDENTS

HOPE M. BABCOCK
Counsel of Record
ARIEL C. NELSON
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9535
babcock@law.georgetown.edu

PATRICK PARENTEAU
ELIZABETH TISHER
Environmental Law and Natural Resources Clinic
Vermont Law School
164 Chelsea St.
South Royalton, VT 05068
(802) 763-8303
pparenteau@vermontlaw.edu

DANIEL ROHLF
Earthrise Law Center
Lewis and Clark Law School
10015 S.W. Terwilliger
Portland, OR 97219
(503) 768-6707
rohlf@lclark.edu

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. The Secretary's Determination That Protection of Unit 1 Is "Essential for the Conservation" of the Dusky Gopher Frog Is Entitled to Deference Because It Is Supported by the Best Scientific Data Available as well as the Text, Structure, Purpose, and Legislative History of the Endangered Species Act. 11

A. The text of the ESA indicates that Congress consciously chose to authorize the Secretary to designate unoccupied habitat that is essential to the conservation of the species even though it may lack all of the "physical or biological features" required for immediate occupancy. 14

B. The structure of the ESA shows that Congress intended that critical habitat designations be used to conserve areas that are currently unoccupied but essential to achieve species recovery. 18

C. The broad remedial purpose of the ESA supports the Secretary's interpretation of "essential for the conservation of the species." 22

D. The legislative history of the ESA confirms the Secretary's interpretation that critical habitat includes unoccupied areas that may require restoration. 25

II. Conservation of Unoccupied Habitat, Even If Suboptimal, Is Essential for Recovering Species Threatened by Climate Change 27

III. The Secretary's Decision Not to Exclude an Area from Critical Habitat Designation Is Judicially Unreviewable 29

A. Section 4(b)(2) establishes no "judicially manageable standards" by which to judge the Secretary's discretionary decision not to exclude an area from critical habitat designation. 30

B. *Bennett v. Spear* is inapposite. 35

CONCLUSION 37

APPENDIX: LIST OF *AMICI CURIAE* 1a

TABLE OF AUTHORITIES

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 29

Aina Nui Corp. v. Jewell, 52 F. Supp. 3d 1110 (D. Haw. 2014) 34

Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662 (2008) 14–15, 17

Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160 (9th Cir. 2010) 24

Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995) 12, 14, 23, 24, 33

Baltimore Gas & Elec. Co. v. Fed. Energy Reg. Comm'n, 252 F.3d 456 (D.C. Cir. 2001) 33–34

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 15, 17

Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977 (9th Cir. 2015) 24, 31, 33, 34

Bennett v. Spear, 520 U.S. 154 (1997).....35, 36

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Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).....12

Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).....29–30

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Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434 (5th Cir. 2001).....19, 23, 24

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Statutes

5 U.S.C. § 701(a)(2).....11, 29

16 U.S.C. § 1531(b) 13, 22

16 U.S.C. § 1532(3) 9, 12, 13, 19, 23

16 U.S.C. § 1532(5)(A)(i) 8, 13, 16

16 U.S.C. § 1532(5)(A)(ii) 8, 16, 17, 19, 27

16 U.S.C. § 1533(a)(3)(A) 13

16 U.S.C. § 1533(b)(2) ..... *passim*

16 U.S.C. § 1533(f)(1) 9, 20

16 U.S.C. § 1533(f)(1)(B)(ii) 20

16 U.S.C. § 1540(g)(1)(C) 35

Rules and Regulations

50 C.F.R. § 402.02 19

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BRIEF OF *AMICI CURIAE* ENVIRONMENTAL LAW PROFESSORS IN SUPPORT OF FEDERAL RESPONDENTS AND INTERVENOR-RESPONDENTS

The undersigned environmental law professors respectfully submit this brief as *amici curiae* in support of Federal Respondents and Intervenor-Respondents.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are twenty-six professors of law who research, teach, and write about environmental law, natural resources law, property law, and administrative law. *Amici* have particular expertise regarding the history, purpose, procedures, and application of the substantive standards of the Endangered Species Act (ESA), the nation's premier wildlife conservation law. This case concerns a question of first impression that goes to the heart of the conservation provisions of the ESA, namely whether the law protects the historic but currently unoccupied habitat of an endangered species (the dusky gopher frog) that has been determined by the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, all appropriate parties have filed letters granting blanket consent to the filing of *amici curiae* briefs.

Secretary of the Interior, based on the best scientific data available, to be "essential for the conservation" of the species. The answer to this question could have profound consequences for a growing list of imperiled species whose historic habitat has been greatly reduced and degraded by the appropriation of land and natural resources to serve human needs.

Amici wish to provide the Court with their independent views on how this important provision of the ESA should be interpreted and what role the courts should play in reviewing the exercise of the discretionary authority that Congress granted to the Secretary. A list of the *amici* and their school affiliations is provided in the Appendix.

STATEMENT OF THE CASE

The International Union for the Conservation of Nature ranks the dusky gopher frog (*Rana sevosa*) among the top 100 most threatened species in the world. Live Science Staff, ***100 Most Threatened Species***, Live Science (Sept. 11, 2012, 9:56 AM), https://www.livescience.com/31743-100-most-threatened-species.html. This critically endangered amphibian was found historically across parts of southwest Alabama, southern Mississippi, and southeast Louisiana. Final Rule To List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,994 (Dec. 4, 2001) (to be codified at 50

C.F.R. pt. 17).[2] But the current total population of dusky gopher frogs in the wild is less than 100 individuals living in three fragmented locations in Mississippi. Pet. App. 108a n.28; Dusky Gopher Frog Recovery Team & Mississippi Field Office U.S. Fish & Wildlife Service, *Dusky Gopher Frog (Rana sevosa) Recovery Plan* (July 23, 2015), at iv [hereinafter "Recovery Plan"]. Habitat loss and degradation threaten the survival and recovery of the dusky gopher frog. Recovery Plan, *supra*, at iv. Less than three percent of the old-growth longleaf pine-savanna upon which the dusky gopher frog and other endemic species depend remains. Lewis Thomas, *Restoring a Disappearing Ecosystem: the Longleaf Pine Savanna*, U.S. Dep't of Agric. Forest Serv. (2013). Thus, as the record demonstrates, recovery of the dusky gopher frog will not be possible "without the establishment of additional breeding populations." Final Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,117, 35,124 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter "Final Designation"].

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[2] At the time of listing, the species was known as the Mississippi gopher frog (*Rana capito sevosa*), a distinct population segment of the dusky gopher frog (*Rana capito*). Final Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,117, 35,118 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17). The species has since been recognized as its own species by the herpetological scientific community, and its scientific name has been changed to *Rana sevosa*. *Id.*

To comply with its obligations under the ESA to promote the recovery of dusky gopher frogs, the U.S. Fish and Wildlife Service (FWS) initially proposed designating eleven units of critical habitat for the species in Mississippi. Proposed Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387 (June 3, 2010) (to be codified at 50 C.F.R. pt. 17). Pursuant to its statutory duty to use the "best scientific data available," 16 U.S.C. § 1533(b)(2), and as required by its peer review policy, FWS submitted the proposed critical habitat designation to relevant outside scientific experts for their evaluation. Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities, 59 Fed. Reg. 34,270 (July 1, 1994); Final Designation, 77 Fed. Reg. at 35,119. These independent experts deemed the proposed designation insufficient for the conservation of the dusky gopher frog, stating that "additional habitat should be considered throughout the historic range of the species." Final Designation, 77 Fed. Reg. at 35,119. Specifically, they recommended including habitat in Louisiana to support the continued existence and recovery of the frog. *Id.* Consistent with the best scientific data available, FWS expanded its critical habitat designation to include historic, but currently unoccupied habitat outside of Mississippi in St. Tammany Parish, Louisiana. *Id.* at 35,124.

FWS determined that the five ephemeral ponds located on the St. Tammany Parish tract (Unit 1) provide "breeding habitat that in its totality is not

known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* According to scientific experts, Unit 1's landscape structure of multiple breeding ponds interconnected by forested upland habitat mimics the natural, historic landscape of dusky gopher frogs that is capable of supporting a viable population. *See* Recovery Plan, *supra*, at 13. The Secretary further determined that maintaining the five seasonally flooded ponds within this area as suitable habitat into which dusky gopher frogs could be translocated is "essential to decrease the risk of extinction of the species resulting from [wildfire, disease, and other] stochastic events and provide for the species' eventual recovery." Final Designation, 77 Fed. Reg. at 35,133. Unit 1 also serves as a refuge for the frog from "environmental threats or catastrophic events," including climate change, which will "undoubtedly affect [frogs] in the coming decades."[3] *Id.* at 35,124.

Unit 1 consists of a complex of five ephemeral ponds and their associated uplands, which as late as 1965 hosted at least two breeding sites for the last known population of the dusky gopher frog outside

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[3] Amphibians are among the species most at risk from climate change because they are susceptible to desiccation, or drying out. Final Designation, 77 Fed. Reg. at 35,124. Climate change may impact the amount or frequency of precipitation, causing irregular and drier conditions. *Id.* This is particularly significant for the dusky gopher frog, which relies on seasonally flooded ponds sourced by heavy winter rain events for breeding. *Id.* at 35,131.

Mississippi. *Id.* at 35,315. Ephemeral ponds suitable for dusky gopher frog breeding cannot be replicated. *Id.* at 35,123. Although artificial, man-made ponds have been successfully used for breeding other gopher frog species, dusky gopher frogs require ponds with more specific features for breeding, namely "grassy, acidic, isolated, ephemeral, depressional wetlands" (or seasonal ponds) lacking predaceous fish. *Id.* at 35,123; Recovery Plan, *supra*, at iv. Ponds must "hold water long enough to allow for tadpole development and metamorphosis, but if they hold water too long they become permanent ponds and no longer have value for [dusky gopher frogs]." Final Designation, 77 Fed. Reg. at 35,123. Despite FWS's ongoing efforts for over a decade at the DeSoto National Forest, it has not established a successful breeding site due to the challenges of creating a functional ephemeral wetland (or seasonal pond) in the landscape. *Id.* Re-creating elsewhere a site similar to Unit 1 that contains not one, but five functional, suitable (and rare) ephemeral breeding ponds in a natural landscape within a timeframe that would "provide near-term conservation benefits to the dusky gopher frog" is *extremely* unlikely, if not impossible. *Id.*

In addition, the surrounding marginally suitable upland habitat of Unit 1 can be successfully restored "with reasonable effort" to provide nonbreeding habitat for dusky gopher frogs. *Id.* at 35,135. FWS has identified a number of voluntary conservation incentives for private landowners to achieve habitat restoration in Unit 1, such as habitat

conservation plans that incorporate the landowners' timber management goals and private landowner funding for habitat management through the U.S. Department of Agriculture's Healthy Forests Initiative. *Id.*

Based on the best scientific data available, the Secretary determined that the presence of ephemeral ponds is essential to the recovery of the species because of "the low number of remaining populations and severely restricted range of the [frogs]" and the restorable nature of the nonbreeding habitat. *Id.* at 35,133. By providing breeding habitat capable of supporting multiple local populations of the frog at a geographically distant location from living populations, Unit 1 increases the frog's resiliency to extinction and its ability to recover, which the Secretary has determined is "essential for the conservation of the [species]." *Id.* at 35,130.

As the Secretary recognized, designation of unoccupied habitat, even though it may not be currently suitable, will become increasingly important to the survival of the growing list of species vulnerable to climate change. *Id.* at 35,124.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly upheld the Secretary's designation of the St. Tammany Parish tract (Unit 1) as critical habitat for the dusky gopher frog. To advance the ESA's goals of species survival

and recovery, Congress explicitly gave the Secretary broad discretion to designate as critical habitat areas that are unoccupied where the Secretary determines "that such areas are essential for the conservation" of the species. 16 U.S.C. § 1532(5)(A)(ii). The question whether designation of such habitat has the potential to serve the recovery goals for a particular species is a matter within the sound expertise of the Secretary.

Here, the Secretary reasonably interpreted the ESA when he found that Unit 1—an area that the frog previously occupied and that continues to contain rare ephemeral ponds suitable for the frog's breeding habitat—is "essential for the conservation" of the species. Accordingly, and based on the unanimous recommendation of the scientific peer review panel, the Secretary properly designated the area as critical habitat. The text, structure, purpose, and legislative history of the ESA support the Secretary's interpretation and critical habitat designation.

Contrary to Petitioner's argument and the views of the dissent below, the plain text of the ESA does not include a "habitability" requirement. Rather, Congress made a conscious decision to differentiate between occupied and unoccupied habitat, making it clear that unoccupied habitat need not contain all of the "physical or biological features" required for immediate occupancy. *See id.* § 1532(5)(A)(i), (ii).

The structure of the Act, along with its broad remedial purpose of species recovery, supports the Secretary's interpretation of "essential for the conservation" of the species. The ESA defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided pursuant to [the Act] are no longer necessary." *Id.* § 1532(3). Another provision requires the Secretary to develop and implement recovery plans "for the conservation and survival of endangered species." *Id.* § 1533(f)(1). These provisions—read together against the backdrop of a statutory scheme aimed at species recovery—support the interpretation that the Secretary may designate unoccupied habitat as critical habitat even if, as here, it has been altered by human activities and requires substantial restoration in order to fully meet the physical and biological needs of the species. Because the land at issue in this case offers the only viable option for species recovery, prohibiting the Secretary from designating that land would be contrary to the Act's structure and purpose.

The legislative history confirms the reasonableness of the Secretary's interpretation and contradicts Petitioner's reading. In the 1978 amendments to the Act, Congress explicitly rejected language that would have imposed temporal and habitability requirements on the designation of unoccupied habitat. This history further confirms that Congress intended to give the Secretary broad

authority to designate unoccupied critical habitat that might require the reintroduction of species unable to reach it on their own.

Contrary to Petitioner's suggestion, the interpretation of the ESA that *amici* support would not grant *carte blanche* authority to the Secretary to designate anything and everything as critical habitat. The presence of a rare, virtually impossible to reproduce complex of breeding ponds—the last remaining within the historic range of the frog outside of Mississippi—is what renders the protection of Unit 1 "essential for the conservation" of the frog and justifies the Secretary's critical habitat designation.

The Fifth Circuit also correctly declined to review the Secretary's decision *not* to exercise his discretion to exclude an area from critical habitat designation. The text of section 4(b)(2) limits the Secretary's discretion *to exclude* an area from designation in certain circumstances (i.e. where the benefits of exclusion do not outweigh the benefits of inclusion or where extinction would result from exclusion). A decision *to exclude*—which is equivalent to a decision not to designate critical habitat—is, therefore, properly reviewable.

However, the statute is silent with respect to decisions *not to exclude*. Section 4(b)(2) contains no "judicially manageable standards" limiting the Secretary's exercise of discretionary authority not to exclude. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Thus, a decision by the Secretary *not to exclude* an area from designation is unreviewable because it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

ARGUMENT

I. The Secretary's Determination That Protection of Unit 1 Is "Essential for the Conservation" of the Dusky Gopher Frog Is Entitled to Deference Because It Is Supported by the Best Scientific Data Available as well as the Text, Structure, Purpose, and Legislative History of the Endangered Species Act.

The question presented is whether the Secretary exceeded the scope of his statutory authority in designating Unit 1 as critical habitat even though it currently lacks some of the physical and biological features required to fully support the gopher frog. The question ultimately turns on the meaning of the phrase "essential for the conservation of the species." Congress has not spoken directly to the precise question at issue, namely whether unoccupied habitat must be immediately "habitable" in order to be declared "essential for the conservation" of the dusky gopher frog. Nevertheless, it is clear from the text, structure, purpose, and history of the ESA, as well as the comprehensive administrative record developed in this case, that the Secretary

properly exercised the broad discretion Congress gave him to use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

Where a statute "is silent or ambiguous" with respect to a specific term, an agency's reasonable interpretation of that term is entitled to substantial deference. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (observing that Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). When Congress enacted the ESA, 16 U.S.C. §§ 1531–44, it "delegated broad administrative and interpretive power to the Secretary," as necessary to execute the complex policy decisions required under the Act. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 708 (1995) (noting that Congress gave Secretary "latitude . . . in enforcing the statute"). Where Congress has "entrusted the Secretary with broad discretion," the Court is "especially reluctant to substitute [its] views" for those of the Secretary. *Id.* Importantly, the ESA need not "compel[] the Secretary's interpretation"; it is sufficient that the interpretation is reasonable and that "Congress did not unambiguously manifest its intent to adopt" an opposing view. *Id.* at 703.

In section 4 of the ESA, Congress directed the Secretary, "to the maximum extent prudent and determinable," to designate critical habitat to protect and recover imperiled species. 16 U.S.C. § 1533(a)(3)(A). Habitat loss and degradation are the leading causes of species endangerment in North America, and threats to habitat affect more than 85% of listed species under the ESA. Amy N. Hagen & Karen E. Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 Conservation Biology 399, 400 (2006). Congress highlighted the importance of habitat conservation in the ESA's stated purpose: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such [species]." 16 U.S.C. § 1531(b). Congress further defined "conservation" as "the use of *all* methods and procedures" necessary to recover listed species, including habitat acquisition and maintenance. *Id.* § 1532(3) (emphasis added). To advance the Act's species survival and recovery goals, Congress entrusted the Secretary with broad discretion to designate as critical habitat both occupied and unoccupied areas that the Secretary determines are "essential for the conservation of the species." *Id.* § 1532(5)(A)(i), (ii).

In this case, the Secretary reasonably concluded that unoccupied habitat includes areas where the endangered species does not currently live, but which could be acquired or improved to provide

for the species' biological and physical needs. Indeed, the Secretary's decision was driven in large part by the unanimous recommendation of the scientific peer review panel that designation of critical habitat outside Mississippi was absolutely essential to recovery of the species. Under these circumstances, the Secretary's determination was eminently reasonable and consistent with the ESA's species recovery goals. *Cf. Sweet Home*, 515 U.S. at 708 (explaining that judicial deference is particularly apt where Secretary's interpretation is supported by "the text, structure, and legislative history of the ESA"). As in *Sweet Home*, and with even stronger factual support in this case, the text of the ESA as well as its structure, purpose, and legislative history demonstrate that the Secretary's interpretation was reasonable. *Id.* at 697.

A. The text of the ESA indicates that Congress consciously chose to authorize the Secretary to designate unoccupied habitat that is essential to the conservation of the species even though it may lack all of the "physical or biological features" required for immediate occupancy.

"When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671

(2008) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)); *see, e.g., Dep't of Treasury, IRS v. Fed. Labor Relations Auth.*, 494 U.S. 922, 932 (1990) ("A statute that in one section refers to 'law, rule or regulation,' and in another section to only 'laws' cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places."). This is particularly true where Congress has included limiting language in one provision but not in another adjacent or nearby provision in the same statutory section. *See United States v. Gonzales*, 520 U.S. 1, 5 (1990) (finding it "significant" that Congress explicitly limited scope of "any crime" to only federal crimes but placed no similar limiting language on "any other term of imprisonment," which appears only two sentences later in statute); *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (observing that "[t]he interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force" where relevant statutory provisions are "in close proximity"); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341–42 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

When Congress amended the ESA in 1978 to define "critical habitat," it included two distinct

statutory provisions, one for occupied habitat and one for unoccupied habitat:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Subsection (i) authorizes the Secretary to designate areas "within the geographical area occupied by the species," if those areas contain the "*physical or biological features* . . . essential to the conservation of the species." *Id.* § 1532(5)(A)(i) (emphasis added). Subsection (ii), on the other hand, authorizes the Secretary to designate areas "outside the geographical area occupied by the species," if he determines those areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). While the designated areas for both types of critical

habitat must be "essential for the conservation of the species," Congress included the limiting terms "physical or biological features" only in subsection (i).

Congress acted "intentionally and purposely" by including the terms "physical or biological features" in subsection (i) and omitting them from subsection (ii), two statutory provisions that are closely related in subject matter and proximity. *Allison Engine Co.*, 553 U.S. at 671 (quoting *Barnhart*, 534 U.S. at 452); *MacLean*, 135 S. Ct. at 919. The text, therefore, signals Congress' intent to limit the Secretary's authority to designate *occupied* critical habitat to areas with *physical or biological features* that are "essential to the conservation of the species," but not the Secretary's authority to designate *unoccupied* critical habitat. In doing so, Congress must have understood that there would be situations where the Secretary would need to designate unoccupied critical habitat that might not contain all the required "physical or biological features" at the time of designation.

Petitioner erroneously reads section 3(5)(A)(ii) to state that Unit 1 must, at present or in the foreseeable future, contain all the physical or biological features necessary for occupancy by the dusky gopher frog. *See* Pet. Brief at 27. This reading would require the Court to ignore the text of the statute and Congress' clear intent to omit this requirement for unoccupied critical habitat designations. *See Dean v. United States*, 556 U.S.

568, 572 (2009) (explaining that courts "ordinarily resist reading words or elements into a statute that do not appear on its face" (quotation omitted)).

B. The structure of the ESA shows that Congress intended that critical habitat designations be used to conserve areas that are currently unoccupied but essential to achieve species recovery.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted); *see also U. S. Ass'n of Texas v. Timber of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). The term "essential" is part of the phrase "essential for the conservation of the species," as well as the larger statutory scheme aimed at species recovery, and the term must be read in that context.

The statute expressly defines the term "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point

at which the measures provided pursuant to [the Act] are no longer necessary." 16 U.S.C. § 1532(3). FWS regulations similarly define "recovery" as the "improvement in the status of listed species to the point at which listing is no longer appropriate under . . . the Act." 50 C.F.R. § 402.02. Thus, the phrase "essential for the conservation of the species" in section 3(5)(A)(ii) authorizes the Secretary to designate as critical habitat areas that are necessary to achieve species recovery. A reading of section 3(5)(A)(ii) requiring that unoccupied critical habitat be presently habitable would unreasonably constrain the Secretary's authority to use "all methods necessary" to achieve species recovery and frustrate Congress' goals in enacting the ESA.

The objectives of the ESA are two-fold: species survival and species recovery. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) ("Congress intended that conservation and survival be two different (though complementary) goals of the ESA."); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) ("[T]he objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status."). Listing a species as endangered or threatened is the critical first step in preventing the extinction of the species; indeed, 98% of listed species survive. FWS, *Defining Success Under the Endangered Species Act*, Endangered Species Bulletin (July 12, 2013), https://www.fws.gov/endangered/news/episodes/bu-

04-2013/coverstory/index.html. Critical habitat designation, however, is the chief mechanism to achieve *recovery* of imperiled species. *Gifford Pinchot*, 378 F.3d at 1070. Species recovery requires future expansion into new territory to support a larger, recovered population, thereby necessitating the designation of geographically distant or presently unsuitable lands as critical habitat. Michael J. Bean, *The Endangered Species Act: Science, Policy, and Politics*, 1162 Ann. N.Y. Acad. Sci. 369, 378 (2009). Because Congress authorized the Secretary to "use all methods and procedures which are necessary" to *recover* a species—not "merely to forestall extinction" of the species, *Gifford Pinchot*, 378 F.3d at 1070—the Secretary may designate unoccupied land as critical habitat even if it is not, at present, actively supporting the species.

The ESA's recovery objective is further carried out by the requirement that the Secretary develop and implement recovery plans "for the conservation and survival of endangered and threatened species." 16 U.S.C. § 1533(f)(1). The Act requires that the Secretary incorporate into each recovery plan "site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species" and "objective, measureable criteria which, when met, would result in a determination . . . that the species be removed from the list." *Id.* § 1533(f)(1)(B)(ii). This section reinforces the ultimate purpose of the statute: to achieve species recovery through the use of

conservation measures, including habitat restoration. Recovery plans implemented by FWS, including the approved recovery plan for the dusky gopher frog, frequently include habitat restoration of unoccupied, degraded habitat as a key component of achieving species recovery via increasing habitat availability for listed species.[4] Without the ability to consider marginally suitable and currently unsuitable land areas as needed for species recovery, recovery plans could not achieve their purpose of species conservation. Similarly, the Secretary has reasonably interpreted "essential" unoccupied critical habitat to include potentially suitable areas to achieve species recovery via conservation measures, such as habitat acquisition and maintenance.

If suitable habitat conditions were available to the dusky gopher frog, the species' population would not have diminished to fewer than 100 individuals. Pet. App. 108a n.28. Where, as here, "the biggest threat to critically endangered species is the destruction of habitat, . . . it does not make sense to hamstring [the Secretary's] efforts to conserve the

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[4] *See, e.g.*, Recovery Plan, *supra*; FWS, *Devils River Minnow (Dionda diaboli) Recovery Plan* (Aug. 10, 2005); Kathryn Kennedy & Jackie Poole, *Chisos Mountain Hedgehog Cactus (Echinocereus chisoensis var. chisoensis) Recovery Plan* (Dec. 8, 1993); FWS, *Recovery Plan for the Alabama Beach Mouse (Peromyscus polionotus ammobates), Perido Key Beach Mouse (P. p. trisslylepsis), and Choctawhatchee Beach Mouse (P. p. allpphrys)* (Aug. 12, 1987); FWS, *Coachella Valley Fringe-Toed Lizard (Uma inornata) Recovery Plan* (Sept. 11, 1985).

species by limiting the designation of habitat to only those areas that contain optimal conditions for the species." *Id.* (quoting FWS). Unoccupied, marginally suitable or unsuitable habitat that can be made suitable plays a key role in recovering imperiled species when optimal habitat areas do not exist because in order to recover, species must be able to expand into new habitat areas. Bean, *supra*, at 378. Recognizing this, the ESA authorizes the Secretary to consider suboptimal areas that can be restored to provide vital additional habitat when the Secretary determines that such habitat is essential for the conservation of the species.[5]

C. The broad remedial purpose of the ESA supports the Secretary's interpretation of "essential for the conservation of the species."

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The Act further directs agencies "to use all methods and procedures which are necessary" to preserve endangered species.

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[5] *See* FWS, Final Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,253–54 (Oct. 12, 2006) (to be codified at 50 C.F.R. pt. 17) (finding unoccupied habitat essential to the conservation of the species even though the habitat did not currently contain all physical or biological features for the species' needs and designating such restorable unoccupied habitat as critical).

Id. § 1532(3). This Court has examined the text, structure, purpose, and history of the Act to conclude that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). The Court noted that "the institutionalization of caution lies at the heart" of the statute. *Id.* at 153. This goal of species recovery, observed the Court, "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.*; *see also Sierra Club*, 245 F.3d at 438 ("[T]he objective of the ESA is to enable listed species not to merely survive, but to *recover* from their endangered of threatened status." (emphasis added)).

Consistent with the ESA's recovery goals, this Court has affirmed the Secretary's authority to interpret the general language of the statute to include habitat protection. In *Sweet Home*, for example, the Court upheld the Secretary's interpretation of "harm" in section 3 of the ESA as including "habitat modification." 515 U.S. at 695. In doing so, it rejected the lower court's conclusion that the term harm "must refer to the direct application of force because the words around it do." *Id.* at 701. The Court looked to the broad purposes of the Act to uphold the Secretary's interpretation that the word harm should include indirect threats to species from habitat destruction. *Id.* The Court noted that the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," *id.* at 699 (quoting *Hill*, 437 U.S. at 180),

and that the 1973 enactment contained a "sweeping prohibition against the taking of endangered species." *Id.* The Court concluded: "Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of 'harm' is reasonable." *Id.* at 700.

Recognizing the "considerable breadth" with which this Court has treated the ESA's terms, lower courts have declined to add words like "habitable" that would limit the Secretary's authority to designate unoccupied habitat as essential to the conservation of a species. *See, e.g.*, *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (refusing to read "habitable" into provision allowing FWS to designate unoccupied land as critical habitat because doing so would contravene plain text of ESA, "which requires [FWS] to show the area is 'essential' without defining that term as 'habitable'"); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1166-67 (9th Cir. 2010) (refusing to limit occupied habitat to areas where species actually reside because allowing FWS "to designate as occupied habitat where the species is likely to be found promotes the ESA's conservation goals and comports with the ESA's policy of institutionalized caution" (internal quotation marks omitted)); *Sierra Club*, 245 F.3d at 438 (refusing to limit designations of unoccupied critical habitat to only endangered species because unoccupied critical habitat should be designated for both threatened and endangered species where it is necessary to achieve species recovery).

Where, as in the case of the dusky gopher frog, the species' conservation depends on land that, while not presently suitable, is the *only* viable option for bringing that species back from the brink of extinction, the Secretary must be able to designate it as critical habitat. If the Secretary is unable to do so, the dusky gopher frog, and other species like it, will be limited to small patches of fragmented habitat with little or no chance for survival and eventual recovery.

D. The legislative history of the ESA confirms the Secretary's interpretation that critical habitat includes unoccupied areas that may require restoration.

When Congress enacted the ESA in 1973, it did so to "widen the protection which can be provided to endangered species." H.R. Rep. No. 93-412 from the Committee on Merchant Marine and Fisheries, accompanying H.R. 37, at 1, reprinted in *A Legislative History of the ESA* at 140. In 1973, and during subsequent amendments and reauthorizations of the ESA, a significant focus of these "widened" protections was critical habitat. *See, e.g.*, H.R. 37, at 5 (1973), reprinted in *A Legislative History of the ESA* at 144 ("The protection of habitat of endangered species is clearly a critical function of any legislation in this area."); 119 Cong. Rec. 25, 669 (1973), reprinted in *A Legislative History of the ESA* at 358

(finding land acquisition essential to success of ESA because "most endangered species are threatened primarily by the destruction of their natural habitats"); H.R. Rep. No. 94-887 (1976), reprinted in *A Legislative History of the ESA at* 497 ("[T]he ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitats."); House Consideration & Passage of H.R. 8092 (1976), reprinted in *A Legislative History of the ESA* at 506 ("The listing process is meaningless unless the Departments take the appropriate steps to protect species' habitats.").

When Congress passed Senate Bill 2899 in 1978, it expressly rejected proposed amendments that would have restricted the definition of unoccupied critical habitat. Specifically, Congress considered and rejected two requirements: (1) that an unoccupied area be "one into which the species can be expected to expand naturally," Senate Consideration & Passage of S. 2899, with amendments, Congressional Record, July 18, 1978, reprinted in *A Legislative History of the ESA* at 1065, and (2) that an unoccupied area be one that is "periodically inhabited by the species," House Consideration & Passage of S. 2899, with amendment, in lieu of H. R. 14104, Congressional Record, Oct. 14, 1978, reprinted in *A Legislative History of the ESA* at 879. In doing so, Congress signaled its intent to give the Secretary broad authority to designate unoccupied critical habitat limited only by the requirement that the areas be "essential for the conservation of the species" and not

by any temporal or habitability requirements. 16 U.S.C. § 1532(5)(A)(ii); *see Hill*, 437 U.S. at 184 ("Agencies in particular are directed by §§ 2(c) and 3(2) of the Act to 'use . . . *all methods* and procedures which are necessary' to preserve endangered species." (emphasis in original) (citations omitted)).

Petitioner's reading of section 3(5)(A)(ii) would prohibit the Secretary from designating habitat deemed necessary for recovery by the best scientific data available merely because it does not currently—but could in the future—support a population of dusky gopher frogs. This contradicts the Act's legislative history, which reveals that Congress rejected language that would have imposed temporal and habitability requirements restricting the Secretary's broad authority to designate unoccupied critical habitat.

II. Conservation of Unoccupied Habitat, Even If Suboptimal, Is Essential for Recovering Species Threatened by Climate Change.

Scientists, legal professionals, and policymakers have recognized the world is changing at a sufficiently rapid pace due to climate change and that a static conservation policy cannot adequately respond to this change. *See* Holly Doremus, *The Endangered Species Act: Static Law Meets Dynamic World*, 32 Wash. U. J.L. & Pol'y 175, 176 (2011).

Species' range shifts and behavioral changes based on climate change impacts are well-documented. Camille Parmesan & Gary Yohe, *A Globally Coherent Fingerprint of Climate Change Impacts Across Natural Systems*, 421 Nature 37, 38–39 (2003). Rising temperatures are forcing many endangered and threatened species to migrate away from their home ranges. *See* J.B. Ruhl, *Climate Change and the Endangered Species Act*, 88 B.U. L. Rev. 1, 22 (2008). Critical habitat designations must be able to respond to the increasing threats listed species face, and future listed species will face, as a result of climate change. *See* Doremus, *supra*, at 215 (asserting that ESA should take into account often unstable course of nature).

The Secretary addressed threats posed by climate change for dusky gopher frogs by designating sites at a sufficient distance from the frogs' current occupied habitat to serve as refuges, if the sites presently occupied are "negatively affected by environmental threats or catastrophic events." Final Designation, 77 Fed. Reg. at 35,124. Due to habitat fragmentation and the frogs' "limited natural ability to move through the landscape," the Secretary identified dusky gopher frogs as particularly "susceptible to the effects of rapid climate change" and determined that "[t]he designation of critical habitat, and the creation of new populations of dusky gopher frogs through reintroductions, should give the species better odds of survival and recovery given the threats posed by climate change." *Id.* Thus, the

Secretary exercised his authority to designate unoccupied critical habitat to protect and recover this imperiled species. Without the ability to designate unoccupied, presently unsuitable areas as critical, the Secretary would lack the tools to protect sufficient habitat for the recovery of dusky gopher frogs and similarly imperiled species.

III. The Secretary's Decision Not to Exclude an Area from Critical Habitat Designation Is Judicially Unreviewable.

Although the Administrative Procedure Act (APA) embodies a "basic presumption of judicial review," *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), section 701(a)(2) of the APA "bars judicial review of agency action when the matter in dispute has been 'committed to agency discretion by law,'" *Drake v. F.A.A.*, 291 F.3d 59, 70 (D.C. Cir. 2002) (quoting 5 U.S.C. § 701(a)(2)). This "very narrow exception," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), applies where the statute provides "no judicially manageable standards . . . for judging how and when an agency should exercise its discretion," *Heckler*, 470 U.S. at 830; *see also Overton Park*, 401 U.S. at 410 (holding that an action is committed to agency discretion by law "where

statutes are drawn in such broad terms that in a given case there is no law to apply" (citation omitted)).

A. Section 4(b)(2) establishes no "judicially manageable standards" by which to judge the Secretary's discretionary decision not to exclude an area from critical habitat designation.

A plain reading of section 4(b)(2) shows that, while a decision *to exclude* an area from designation is reviewable, a decision *not to exclude* is not. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (looking first to the language of the provision at issue to determine whether a judicially manageable standard existed). The first sentence of section 4(b)(2) provides that "[t]he Secretary *shall* designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). The second sentence states that

> [t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure

> to designate such area as critical habitat will result in the extinction of the species concerned.

Id. (emphasis added).

Congress articulated judicially manageable standards in the second sentence of section 4(b)(2) by conveying that the Secretary has the discretion to exclude areas from designation after following the statute's specified process. *See* Pet. App. 34a–35a. The second sentence *prohibits* exclusion in certain circumstances: if the Secretary determines that the benefits of exclusion do not outweigh the benefits of inclusion, or if extinction would result from exclusion. *See Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1033 (9th Cir. 2015) ("The term 'outweigh' in the second sentence limits the agency's discretion to exclude areas from designation."). Because the statute bars the Secretary from excluding areas in these defined instances, secretarial decisions *to exclude* areas from designation are reviewable.

Moreover, a decision to exclude "otherwise essential habitat is . . . properly reviewable because it is equivalent to a decision not to designate critical habitat"—an action that section 4(b)(2) obligates the Secretary to take. *Bear Valley Mut. Water Co.*, 790 F.3d at 990.

In contrast, section 4(b)(2) does not articulate any judicially manageable standards "governing when the [Secretary] *must* exclude an area from designation." Pet. App. 35a (emphasis in original). The permissive language of the second sentence of section 4(b)(2) gives the Secretary the discretion to prioritize conservation when making an exclusion decision.

Even if the Secretary determined that the economic benefits of exclusion did outweigh the benefits of inclusion, the statute would not obligate the agency to exclude the area. *See* 16 U.S.C. § 1533(b)(2); *cf.* Amy Sinden, *The Economics of Endangered Species: Why Less Is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 196 (2004) ("Rather than mandating an approach that would ensure that critical habitat was never designated when economic costs outweighed benefits, Congress sought only to give the Secretary the flexibility to deviate from a purely biological approach when she deemed it appropriate."). Under no circumstances does the second sentence obligate the Secretary to exclude an area from designation.[6] *See* Pet. App. 34a–35a; *see*

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[6] Additionally, as the Ninth and Fifth Circuits have recognized, the agency has the discretion to choose its methodology when making decisions pursuant to section 4(b)(2). *See Bldg. Indus. Ass'n*, 792 F.3d at 1032–33 ("[A]fter the agency considers economic impact, the entire exclusionary process is discretionary and there is no particular methodology that the agency must follow"); Pet. App. 36a ("[Section 4(b)(2)] does not require a

also Bear Valley Mut. Water Co., 790 F.3d at 990. The ESA's "broad purpose to protect endangered and threatened wildlife" supports this plain reading of section 4(b)(2). *See Sweet Home*, 515 U.S. at 700; *see also supra* Sections I.B.–C. (discussing the ESA's objectives and broad remedial purpose).

This Court and lower courts have found that similar provisions in other statutes fail to articulate judicially manageable standards. *See, e.g.*, *Webster*, 486 U.S. at 594, 600 (holding that section 102(c) of the National Security Act of 1947, which provides that the director of Central Intelligence can terminate employees "whenever he shall deem such termination necessary or advisable in the interests of the United States," "foreclose[d] the application of any meaningful judicial standard of review"); *Baltimore Gas & Elec. Co. v. Fed. Energy Reg. Comm'n*, 252 F.3d 456, 461 (D.C. Cir. 2001) (holding that section 717 of the Natural Gas Act, providing that the Federal Energy Regulatory Commission "may in its discretion bring an action" against a violator, provided no

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particular methodology for considering economic impact."); Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 Buff. L. Rev. 1095, 1111 (2010) ("Congress did not mandate an actual cost-benefit analysis for designating critical habitat—rather, it allowed the agencies to 'take into account' economic impacts, which is quite different, and does not lend itself to striking down designations for inadequate consideration of economic impacts." (footnotes omitted)).

judicially manageable standards to review the agency's decision to settle an enforcement agreement); *Sierra Club v. Larson*, 882 F.2d 128, 129, 132 (4th Cir. 1989) (holding that section 131 of the Highway Beautification Act, requiring that states exercise "effective control" over outdoor advertising, provided "no law to apply" to the Federal Highway Administration's decision not to institute enforcement proceedings).

The only circuit courts to address this issue have held that the decision not to exclude an area from critical habitat designation is unreviewable. *See* Pet. App. 34a–35a; *Bear Valley Mut. Water Co.*, 790 F.3d at 990. District courts have reached the same conclusion. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) (holding the Secretary's "ultimate decision not to exclude [an area] from designation" was committed to agency discretion); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (finding the Secretary's decision not to exclude is unreviewable under the APA because "the plain reading of the statute fails to provide a standard by which to judge the . . . decision"); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629 WBS-GGH, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [Secretary's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion."),

opinion modified on other grounds on reconsideration, No. CIV. S-05-0629 WBS-GGH, 2007 WL 201248 (E.D. Cal. Jan. 24, 2007). *But see Wyo. State Snowmobile Ass'n. v. U.S. Fish & Wildlife Serv.*, 741 F. Supp. 2d 1245, 1248 (D. Wyo. 2010).

B. *Bennett v. Spear* is inapposite.

In *Bennett v. Spear*, the question was whether the petitioners could seek judicial review under the ESA's citizen-suit provision. 520 U.S. 154, 157 (1997). The *Bennett* petitioners claimed that the Secretary made an implicit critical habitat designation for an endangered fish by issuing a Biological Opinion under section 7(b) of the ESA without first considering the purported designation's economic impact under section 4(b)(2). *Id.* at 160. The government contended that the petitioners could not pursue this claim under the citizen-suit provision, which authorizes citizen suits when the Secretary fails to perform "any act or duty" under the ESA "which is not discretionary." *Id.* at 171–72 (citing 16 U.S.C. § 1540(g)(1)(C)). The Supreme Court held that the petitioners could seek judicial review under the citizen-suit provision because section 4(b)(2) requires the Secretary to consider the economic impacts before designating critical habitat. *Id.* at 172. The Court thus allowed the petitioners to proceed on their claim that the Secretary failed to satisfy a procedural requirement. *Id.* at 178.

In *Bennett*, the Secretary did not make an exclusion decision under section 4(b)(2), and the parties never briefed—nor did the Court address—whether a decision not to exclude an area from designation is separately reviewable. Thus, Petitioner's reliance on the *obiter dictum* that the "Secretary's ultimate decision [to designate critical habitat] is reviewable only for abuse of discretion," *id.* at 172, is inapposite. *See Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

Further, unlike in this case, the *Bennett* petitioners alleged that the Secretary did not adhere to section 4(b)(2)'s procedural requirements when he failed to consider the economic impacts of a purported implicit critical habitat designation. *Bennett*, 520 U.S. at 160, 172. The *Bennett* Court stated that "[i]t is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.* at 172. Here, there is no question that the Secretary followed the required procedural step of considering economic impact when he designated critical habitat for the dusky gopher frog under the first sentence of section 4(b)(2). Rather, Petitioner argues that the Secretary's failure to exclude Unit 1 from the ultimate critical habitat designation was incorrect. However, as set forth above, *see supra* Section III.A., the Secretary's

decision not to exclude an area from designation is unreviewable.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

HOPE M. BABCOCK
Counsel of Record
ARIEL C. NELSON
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9535
babcock@law.georgetown.edu

PATRICK PARENTEAU
ELIZABETH TISHER
Environmental and
Natural Resources Law Clinic
Vermont Law School
164 Chelsea St.
South Royalton, VT 05068
(802) 763-8303
pparenteau@vermontlaw.edu

DANIEL ROHLF
Earthrise Law Center
Lewis and Clark Law School
10015 S.W. Terwilliger
Portland, OR 97219
(503) 768-6707
rohlf@lclark.edu

Counsel for Amici Curiae

July 2, 2018

APPENDIX

LIST OF *AMICI CURIAE*[7]

William L. Andreen
Edgar J. Clarkson Professor of Law
University of Alabama School of Law

Michael C. Blumm
Jeffrey Bain Faculty Scholar, Professor of Law
Lewis and Clark Law School

Jamison E. Colburn
Joseph H. Goldstein Faculty Scholar, Professor of Law
Penn State Law

Robin Kundis Craig
James I. Farr Presidential Endowed Professor of Law
University of Utah S.J. Quinney College of Law

Holly Doremus
James H. House and Hiram H. Hurd Professor of Environmental Regulation
University of California, Berkeley Law School

Tim Duane
Professor of Environmental Studies
University of California, Santa Cruz;

---

[7] Affiliations are listed for identification purposes only.

Visiting Professor of Law
University of San Diego, School of Law

Robert L. Fischman
George P. Smith, II Distinguished Professor of Law
Indiana University Maurer School of Law

Richard Frank
Professor of Environmental Practice
University of California, Davis School of Law

Robert L. Glicksman
J.B. & Maurice C. Shapiro Professor of Environmental Law
The George Washington University Law School

Oliver A. Houck
Professor of Law
Tulane University Law School

Sam Kalen
Centennial Distinguished Professor of Law
University of Wyoming College of Law

Robert B. Keiter
Wallace Stegner Professor of Law, University Distinguished Professor
University of Utah S.J. Quinney College of Law

Sarah Krakoff
Raphael J. Moses Professor of Law
University of Colorado Law School

Albert Lin
Martin Luther King, Jr. Professor of Law
University of California, Davis School of Law

Patrick McGinley
Charles H. Haden II Professor of Law
West Virginia University College of Law

Joel A. Mintz
Professor of Law
Nova Southeastern University College of Law

Dave Owen
Professor of Law
University of California, Hastings College of Law

Justin Pidot
Professor of Law
University of Denver Sturm College of Law

Zygmunt J. B. Plater
Professor of Law
Boston College Law School

Kalyani Robbins
Professor of Law (as of August 2018)
Florida International University College of Law

Irma S. Russell
Edward A. Smith/Missouri Chair in Law, the Constitution, and Society, Professor of Law
University of Missouri-Kansas City School of Law

William J. Snape, III
Assistant Dean, Fellow and Practitioner-in-Residence
American University, Washington College of Law

Mark Squillace
Professor of Law
University of Colorado Law School

Steph Tai
Professor of Law
University of Wisconsin Law School

A. Dan Tarlock
University Distinguished Professor Emeritus,
Professor of Law Emeritus
Chicago-Kent College of Law

Annecoos Wiersema
Professor of Law
University of Denver Sturm College of Law